

ALERT ENERGY & NATURAL RESOURCES



Federal Court Certifies Questions to West Virginia Supreme Court of Appeals About Deductibility of Post-Production Expenses and the Viability of *Tawney*

The United States District Court for the Northern District of West Virginia has certified questions to the West Virginia Supreme Court of Appeals asking whether the seminal decision in *Estate of Tawney v. Columbia Natural Resources, LLC*, 219 W.Va. 266, 633 S.E.2d 22 (2006) regarding the deductibility of post-production expenses remains the law of West Virginia, and if so, the proper interpretation of *Tawney*.

In *Charles Kellam, et al. v. SWN Production Company, LLC, et al.*, No. 5:20-CV-85, a class action royalty case, the District Court, Judge John Preston Bailey, certified on his own motion whether *Tawney* remains the law of West Virginia, whether the lease in question allowed the deductions, and the proper application of *Tawney*. The District Court certified the questions without ruling on the defendants' pending Motion for Judgment on the Pleadings which argued the Kellam's lease complied with *Tawney* and the District Court was bound by the decision in *Young v. Equinor USA Onshore Properties, Inc.*, 982 F.3d 201 (4th Cir. 2020), where the Fourth Circuit Court of Appeals reversed Judge Bailey and held a similar lease clearly and unambiguously allowed the deduction of post-production expenses. The Kellam's lease states the lessee agrees to pay the lessor "as royalty for the oil, gas, and/or coalbed methane gas marketed and used off the premises and produced from each well drilled thereon, the sum of one-eighth (1/8) of the price paid to Lessee per thousand cubic feet of such oil, gas, and/or coalbed methane gas so marketed and used . . . less any charges for transportation, dehydration and compression paid by Lessee to deliver the oil, gas, and/or coalbed methane gas for sale."

In *Young*, the Fourth Circuit Court of Appeals rejected the finding by Judge Bailey that the lease did not contain sufficiently explicit language about the method of calculating deductions and therefore did not comply with *Tawney*, noting that "*Tawney* doesn't demand that an oil and gas lease set out an Einsteinian proof for calculating post-production costs. By its plain language, the case merely requires that an oil and gas lease that expressly allocates some post-production costs to the lessor identify *which costs* and *how much* of those costs will be deducted from the lessor's royalties." *Young*, 982 F.3d at 208.

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In the September 14, 2021 Order certifying the questions to the West Virginia Supreme Court of Appeals, Judge Bailey relied on his similar reasoning in *Young*, which the Fourth Circuit Court of Appeals rejected.

The West Virginia Supreme Court of Appeals may reformulate the questions and will decide whether to accept the certified questions for review. If they do, a briefing schedule will be entered, and the court will also decide whether to allow limited or full oral argument.

For more information about the case contact Tim Miller, tmiller@babstcalland.com, Jennifer Hicks, jhicks@babstcalland.com, or Katrina Bowers, kbowers@babstcalland.com, who are serving as counsel for the defendants in *Kellam*.

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